CAS 2017/O/5332 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) and Elena Slesarenko

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Prof. Jens Evald, Professor of Law, Aarhus, Denmark

in the arbitration between

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF),
Monaco
Represented by Mr Ross Wenzel, Attorney-at-Law at Kellerhals Carrard in Lausanne, Switzerland

Claimant

and

RUSSIAN ATHLETIC FEDERATION (RUSAF), Moscow, Russia

First Respondent

and

Ms. ELENA SLESARENKO, Moscow, Russia

Second Respondent

I. PARTIES

1. The International Association of Athletics Federations ("IAAF" or the "Claimant") is the world governing body for track and field, recognized as such by the International Olympic Committee. It has its seat and headquarters in Monaco

2. The Russian Athletics Federation (RUSAF) (the "Russian Federation" or the "First Respondent") is a member, currently suspended, of the IAAF as the national athletics federation for Russia.

3. Ms. Elena Slesarenko (the "Athlete" or "Second Respondent", together with the First Respondent, the "Respondents") is a Russian high jumper. The Athlete is an International-Level Athlete for the purposes of the IAAF Anti-Doping Rules.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties' submissions on the merits of this appeal. Additional facts and allegations found in the parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. The Games of the XXIX Olympiad in Beijing (2008)

5. On 23 August 2008, the Athlete underwent a doping test at the Games of the XXIX Olympiad in Beijing in 2008 (the "Games").

6. The sample was analysed and did not reveal the presence of any prohibited substance.

7. The IOC requested the Lausanne laboratory to perform further analyses on the Athlete's sample. The analyses revealed the presence of Dehydrochlormethyltestosterone ("DHCMT", also known as "oral turinabol") metabolites (the "Olympic Games Violation"). This substance was found in both the A Sample as well as the B 1-Sample (further to a splitting of the B-Sample). The Athlete was informed by the IOC of her right to have the B2-Sample analysed, which she did not exercise in the set deadline.

8. DHCMT is an Exogenous Androgenic Anabolic Steroids, prohibited under section S1.1.a of the relevant Prohibited List.

9. Having been informed of the Adverse Analytical Finding, the IAAF granted the Athlete, by letter dated 6 September 2016, an opportunity to provide an explanation for such finding. The Athlete was informed that, should the explanation be inadequate, she would be provisionally suspended.

10. As the Athlete did not provide any explanation, the IAAF provisionally suspended her on 4 October 2016.

11. In view of the above Adverse Analytical Finding, the IOC Disciplinary Commission found, on 10 November 2016, that the Athlete had committed an anti-doping rule violation ("ADRV") and disqualified her results obtained at the event in which she participated at the Games, namely the Women's high jump (the "IOC Decision").

12. The case of the Athlete was then referred to the IAAF for the imposition of consequences over and above those related to the Games.

B. The 13th IAAF World Championships in Athletics' held in Daegu (2011)

13. The Athlete underwent a doping test at the 13th IAAF World Championships in Athletics' held in Daegu (the "WC") on 3 September 2011.

14. The sample was analysed and did not reveal the presence of any prohibited substance.

15. A further analysis of the sample was conducted by the Lausanne laboratory and revealed the presence of the DHCMT metabolite (4-chloro-18-nor-17b-hydroxymethyl, 17a-methyl-5b-androst-13-en-3a-ol) (the "WC Violation").

16. On 16 December 2016, the IAAF informed the Athlete of this Adverse Analytical Finding and granted her with the opportunity to provide an explanation for such finding and to exercise her right to request the analysis of the B-sample by 26 December 2016.

17. The Athlete did not provide any response within the given time-frame, nor did she request the analysis of her B-Sample.

C. Further Results Management

18. By letter dated 15 May 2017, the IAAF notified the Athlete that the Olympic Games Violation case had been referred to it, that she had been subject to disciplinary proceedings initiated by the IOC which concluded that she was guilty of a doping offence under the IOC Anti-Doping Rules for the Games and that the IAAF was not aware of any appeal against the IOC Decision which, therefore, had become final and binding.

19. In the same letter, the IAAF noted that, in connection with the World Championships Violation, the Athlete had not requested the analysis of her B2-Sample within the given deadline and informed her that by waiving her right to the counter-analysis, she was deemed to have accepted the Adverse Analytical Finding.

20. The Athlete was informed that her case, comprising the Olympic Games Violation and the World Championships Violation, would be referred to CAS and was granted a deadline until 29 May 2017 to choose whether to proceed under Rule 38.3 or 38.19 of

the 2016-2017 IAAF Rules, failing which the CAS hearing would be conducted under Rule 38.3 of the 2016-2017 IAAF Rules.

21. The Athlete never responded to this letter.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 22 September 2017, the IAAF filed a Request for Arbitration with the CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (2017 edition) (the "CAS Code"). The IAAF informed the CAS that its Request for Arbitration was to be regarded as the IAAF's Statement of Appeal and Appeal Brief for the purposes of R47 and R51 of the CAS Code, the procedure being governed by the CAS appeals arbitration rules, pursuant to Rule 38.3 of the 2016-2017 IAAF Rules. Furthermore, the IAAF requested the matter to be submitted to a sole arbitrator, acting as a first instance body. The Request for Arbitration contained a statement of facts and legal arguments and included requests for relief.

23. On 29 September 2017, the CAS Court Office initiated the present arbitration and specified that the case had been assigned to the CAS Ordinary Division but it would be dealt with in accordance with the Appeals Arbitration Division rules. The Respondents were further invited to submit their Answers. Additionally, the First Respondent was invited to forward the letter and its exhibits to the Second Respondent. Finally, the Parties were invited to communicate the personal postal address of the Second Respondent at their earliest convenience. The cover letter accompanying the Request for Arbitration was also sent by e-mail to the e-mail address (*elenasles1@mail.ru*) provided by the IAAF for the Second Respondent.

24. On 10 November 2017, the CAS Court Office advised the Parties that it had not received any Answer from the Respondents. Therefore, the CAS Court Office invited the First Respondent to inform the CAS Court Office by 16 November 2017 of the date on which the CAS letter of 29 September 2017 had been delivered to the Second Respondent and to produce any relating evidence of this date. Furthermore, the Claimant and the Respondents were again invited to communicate the personal postal address of the Second Respondent within the same time limit.

25. On 16 November 2017, the Claimant provided the CAS with the Second Respondent's personal postal address.

26. By letter of 17 November 2017 delivered by e-mail and by DHL to the Second Respondent's personal address, the CAS Court Office informed the Parties that unless an objection will be submitted by one of the Parties within three (3) days, it will be considered that the Parties agree that any future communications by the CAS Court Office to the Second Respondent will be sent by e-mail to the Second Respondent's e-mail address or her personal address.

27. On 30 November 2017, the CAS Court Office informed the Parties that DHL could not deliver the CAS Court Office letter of 17 November 2017 to the Second Respondent because the address would be incorrect. Therefore, the CAS Court Office asked the

Claimant to provide the CAS with the postal address to be used for the notification of the postal communication for the Second Respondent, in order for the CAS to deliver future postal communications. Furthermore, the CAS Court Office invited the First respondent to confirm by fax/e-mail that it duly forwarded to the Second Respondent CAS previous postal communications which were sent at its address for the Second Respondent's attention.

28. On 5 December 2017, the Claimant provided the CAS with the Second Respondent's new personal postal address.

29. On 8 December 2017, in accordance with Article R54 of the CAS Code and on behalf of the President of the CAS Ordinary Arbitration Division, the CAS Court Office informed the Parties that Prof. Jens Evald had been appointed as the Sole Arbitrator. The Parties did not raise any objection to the constitution and the composition of the Panel.

30. In the same letter, the Parties were informed that unless an objection that would be sent by one of the Parties within 4 days, it will be considered that they all agree that the CAS future communications for the Second Respondent be sent by e-mail to the Second Respondent's e-mail address or her new personal address.

31. On 22 December 2017, the CAS Court Office informed the Parties that the First Respondent had failed to indicate when it provided the Second Respondent with the CAS Court Office letter of 29 September 2017 together with the enclosures that all the Parties tacitly agree that the notification for the Second Respondent shall be made by e-mail to the Second Respondent's e-mail address or her new personal address. Therefore, the CAS Court Office invited the Second Respondent to submit, within 30 days, a statement of defence. As for the enclosures of the Request for Arbitration, the CAS Court Office noted that they were sent exclusively by e-mail and, unless an objection that would be sent by the Second Respondent within 3 days, they shall be considered to have been duly received by the Second Respondent. Furthermore, the CAS Court Office noted that unless it was informed otherwise by the Second Respondent it will be considered that she has chosen not to file any written submissions in this matter and the Sole arbitrator would nevertheless proceed with the arbitration. Finally, the CAS Court Office invited the Parties to inform by 9 January 2018 whether they prefer a hearing to be held or for the Sole Arbitrator to issue an award based solely on the written submissions.

32. In its e-mail of 9 January 2018, the Claimant stated that the matter could be decided on the basis of the written record, but received its final position until it had reviewed the Answer (if any).

33. On 6 February 2018, the CAS Court Office the CAS Court Office informed the Parties that its letter of 22 December 2017 had been delivered to the Second Respondent on 29 December 2018 and that neither of the Respondents replied to this letter. Further, the Parties were advised that the Sole Arbitrator had decided, in accordance with Articles R55 and R57 of the CAS Code to proceed with the arbitration and deliver an award, solely based on the Parties' written submissions, without the need to hold a hearing. Indeed, none of the Parties requested the holding of a hearing and the Sole Arbitrator

deemed himself sufficiently well-informed to do so. The Parties were further invited to return an enclosed Order of Procedure within 5 days and were informed that, unless the CAS Court Office would hear otherwise from one the parties within the same time-limit, it would be considered that all parties agree with the issuance of an award based on the CAS file in its current state.

34. The Claimant's counsel signed and returned the Order of Procedure to the CAS Court Office on 12 February 2018. Both Respondents failed to return a duly signed copy of the Order of Procedure.

35. On 20 February 2018, the CAS Court Office informed the Parties that its letter of 6 February 2018 had delivered to the Second Respondent on 9 February 2018 and that neither of the Respondents replied to this letter. Therefore, as announced, the Respondents have thus tacitly agreed with the issuance of an award based on the CAS file in its current state.

IV. PARTIES SUBMISSIONS

36. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in his deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

37. The IAAF submissions, in essence, may be summarized as follows:

- In the IOC Decision, the IOC Disciplinary Commission determined that the Athlete had committed an anti-doping rule violation (Presence of a Prohibited Substance) under the IOC Anti-Doping Rules and the IAAF is bound by this decision as per Rule 46 of the 2016-2017 IAAF Rules.

- In any event, Rule 32.22(a) of the IAAF Rules also forbids the Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.

- The presence of DHCMT has been found in the Athlete's A- and B1-Samples collected at the Games. DHCMT is prohibited in- and out-of-competition under section S1.1.a of the 2008 Prohibited List. DHCMT is a non-specified substance.

- The Athlete has waived her right to the analysis of the B2-Sample and the B2-Sample was not analysed. Therefore, the fact of the anti-doping rule violation in connection with the Games is unquestionable.

- The Athlete underwent another doping control at the WC (2011), and the reanalysis revealed the presence of a DHCMT metabolite. DHCMT is prohibited in-and out-of-competition under S1.1.a of the 2011 Prohibited List.

- The Athlete has waived her right to the analysis of the B-sample and the B-Sample was not analysed. Therefore, the Athlete committed another anti-doping rule violation at the WC.

- The IAAF does not submit that both violations should be considered as multiple violations for the purposes of the IAAF Rules. The violations shall be considered together as one single first violation ant the sanction imposed shall be based on the violation that carries the more severe sanction.

- The WC violation is governed by the 2010-2011 IAAF Rules. These rules are based on the 2009 version of the World Anti-Doping Code, which introduced the notion of aggravating circumstances. This regime enabled a decision-making body to increase the sanction up to four years of ineligibility depending on certain factors. Amongst the factors to be taken into consideration for an aggravated sanction, Rule 40.6 of the 2010-2011 IAAF Rules referred *inter alia* to the multiple use of a prohibited substance, the use of multiple prohibited substances, or the fact that the violation was committed as part of a doping plan or scheme. In addition, Rule 40.7(d)(i) expressly set out the "*the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Rule 40.6)*".

- In view of the above, and in particular given that the Athlete committed two anti-doping rule violations, the IAAF will be seeking the imposition of an aggravated sanction up to four years of ineligibility under Rule 40.6 of the 2010-2011 IAAF Rules.

- As a result, the sanction in respect of the WC violation is more severe than that of the Olympic Games violation. Indeed, the latter was governed by the 2008 IAAF Rules (based on the pre-2009 World Anti-Doping Code) which did not provide for aggravating circumstances. The Athlete's sanction shall therefore be based on the WC violation, governed by the 2010-2011 IAAF Rules.

- In the present case the Athlete used a Prohibited Substance, namely DHCMT, at least twice, at the Games and at the WC. This justifies as such the imposition of an aggravated period of ineligibility of up to four years.

- The use of DHCMT was widespread in Russia at the relevant period. Per the two reports of Professor Richard McLaren, DHCMT was one of the substances included in the cocktail created by Dr. Rodchenkov. No fewer than 76 athletes tested positive for DHCMT further to retesting of their samples from Beijing and London Games (out of 96 positive retesting analyses). The Games and the WC violations must be situated within the specific context of that pervasive and sophisticated doping program.

- In view of the above, and especially given the fact that the Athlete committed two severe independent anti-doping rule violations three years apart, the IAAF considers that the only suitable sanction is a four year Ineligibility period.

- This case is not one where results should be saved. The Athlete's results should be disqualified all the way from doping control on 23 August 2008 until her suspension on 4 October 2016.

38. In light of the above, the IAAF submits the following prayers for relief in the Request for Arbitration:

"(i) CAS has jurisdiction to decide on the subject matter of this dispute;

(ii) The Request for Arbitration of the IAAF is admissible.

(iii) A period of ineligibility of two to four years imposed on, or voluntarily accepted, by the Athlete, commencing on the date of the CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the CAS Award shall be credited against the total period of ineligibility to be served.

(iv) All competitive results obtained by the Athlete from 23 August 2008 until 4 October 2016 (to the extent not already disqualified by the IOC decision) are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money.

(v) The arbitration costs are borne entirely by RUSAF or, in the alternative, jointly and severally by the Respondents.

(vi) The IAAF is awarded a significant contribution to its legal costs."

39. Although duly invited, neither of the Respondents filed an Answer to the IAAF's Request for Arbitration, to be regarded as its combined Statement of Appeal and Appeal Brief, within the prescribed time limit or thereafter. Pursuant to Article R55 of the CAS Code, the Sole Arbitrator can proceed to make an award in relation to IAAF's claims. Despite the lack of formal Answer from the Respondents, the legal analysis below will take into account all available relevant information, and it is not restricted to the submissions of the IAAF.

V. JURISDICTION

40. The jurisdiction of the CAS in this appeal derives from Rule 38.3 of the 2016-2017 IAAF Rules, effective from 1 November 2015.

41. Rule 38.3 of the 2016-2017 IAAF Rules provides as follows:

"If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete's request to the member [...] If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period

thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. If the Member fails to complete a hearing within two months, or, if having a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and the expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rue 42. A failure by a Member to hold a hearing for an Athlete within two months under this Rule may further result in the imposition of a sanction under Rule 45."."

42. The suspension of the RUSAF's membership of the IAAF was confirmed on the occasion of the IAAF Council meeting in Monaco on 26 November 2015. On 17 June 2016, 1 December 2016, on 3 July 2017 and, more recently, on 6 March 2018, the IAAF Council decided that RUSAF had not met the conditions for reinstatement to membership. The suspension of RUSAF therefore remains in place. As a consequence of its suspension, RUSAF was not in a position to conduct the hearing process of the Athlete's case by way of delegated authority from the IAAF pursuant to Rule 38 of the 2016-2017 IAAF Rules.

43. Consequently, RUSAF is not in a position to convene a hearing within the two-month time period set out in Rule 38.3 of the 2016-2017 IAAF Rules. In these circumstances, it is not necessary for the IAAF to impose any deadline on RUSAF for that purpose.

44. In view of the inability of RUSAF to conduct a hearing process within the requisite timeframe, the Athlete's status as an International-Level Athlete and her tacit acceptance of such procedure, the IAAF is entitled pursuant to Rule 38.3 of the 2016-2017 IAAF Rules to refer the case of the Athlete to CAS to be heard in the first instance by a Sole Arbitrator. This has also been confirmed in different CAS awards, including *CAS 2017/A/4949*, *CAS 2016/O/4463* at para. 48 *et seq.* and *CAS 2016/O/4464*, at para. 62 *et seq.*

45. It follows that the CAS has jurisdiction to adjudicate and decide the present matter and the present case shall be dealt with in accordance with the Appeals Arbitration rules.

VI. ADMISSIBILITY

46. The Claimant's Request for Arbitration to be regarded as its combined Statement of Appeal and Appeal Brief complies with all the procedural and substantive requirements

of the CAS Code. Neither the Respondents disputes the admissibility of the IAAF's claims. Accordingly, the Sole Arbitrator deems the claims admissible.

VII. APPLICABLE LAW

47. The IAAF submits that the IAAF rules and regulations are the applicable rules in this case. In the IAAF's view, the procedural aspects of these proceedings shall be subject to the 2016-2017 edition of the IAAF Rules. The IAAF further submits that the substantive matters. The Athlete's anti-doping rule violations are subject to the rules in place at the time for the alleged anti-doping rule violations, i.e., the 2008 IAAF Rules and the 2010-2011 IAAF Rules. To the extent that the IAAF Rules do not deal with a relevant issue, Monegasque law shall be applied (on a subisidiary basis) to such issue.

48. RUSAF or the Athlete did not put forward any specific position in respect of the applicable law.

49. Article R58 of the Code of Sports-related Arbitration (the "CAS Code") provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

50. The provision is in line with Article 187, paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: "*The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in absence of such choice, according to the law with which the action is most closely connected.*"

51. Article 13.9.4 of the IAAF Anti-Doping Rules entered into force on 3 April 2017 (the "IAAF ADR") states as follows:

"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations)."

52. Article 13.9.5 of the IAAF ADR further provides as follows:

"In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise."

53. Article 1.7 of the IAAF ADR states that *"These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons [...] (b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in*

Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held."

54. The Athlete is an International-Level Athlete for the purposes of the IAAF ADR and both violations arose from samples collected at the Games and the WC; the Athlete is thus bound by the IAAF ADR.

55. Based on the above, and considering that the applicable law is not in dispute, the applicable laws in this arbitration are the IAAF rules and regulations and, subsidiarily Monegasque law.

56. Pursuant to article 21.3 of the IAAF ADR, the Sole arbitrator is satisfied that anti-doping rule violations committed prior to 3 April 2017 (the effective date as defined by Article 1.13 of the IAAF ADR)) are subject, for substantive matters, to the rules in place at the time of the alleged anti-doping rule violation and, for procedural matters, to the version of the rules in place immediately prior to the Effective Date (i.e. 3 April 2017).

57. As the Olympic Games Violation occurred in 2008 and the WC Violation in 2011, the 2008 IAAF Competition Rules (the "2008 IAAF Rules") shall, in principle, apply to the substantive matters of the former and the 2011 IAAF Competition Rules (the "2010-2011 IAAF Rules") to the latter.

58. The version of the rules in place immediately prior to the Effective Date is the 2016-2017 IAAF Competition Rules, effective from 1 November 2015 (the "2016-2017 IAAF Rules"). The 2016-2017 IAAF Rules are therefore applicable for procedural matters in respect of both violations.

VIII. MERITS

59. The main issues to be resolved by the Sole Arbitrator are:

A. The Olympic Games 2008: Did the Athlete commit an anti-doping rule violation?

B. The World Championships 2011: Did the Athlete commit an anti-doping rule violation?

In case of affirmative answer to questions A and/or B

C. Sanction

(1) Period of Ineligibility start and end date

(2) Disqualification

A. The Olympic Games 2008: Did the Athlete commit an ADRV?

60. The Sole Arbitrator observes that, in its attempt to establish the Athlete's ADRV, the IAAF primarily relies on the IOC Decision confirming an ADRV by the Athlete.

61. Pursuant to Rule 46.2 of the 2017-2017 IAAF Rules:

"(...) In the case of an adjudication of the IOC arising from an anti-doping rule violation occurring at the Olympic Games, the IAAF and its Members shall recognize the finding of an anti-doping rule violation once it becomes final under applicable rules and shall thereafter submit the determination of the Athlete or other Person's sanction beyond disqualification from the Olympic Games to the results management process provided in Rule 37 and 38."

62. The Sole Arbitrator notes that pursuant to Rule 46.2 of the 2016-2017 IAAF Rules, in case of an adjudication of the IOC arising from an ADRV occurring at the Olympic Games, the IAAF shall recognize the finding of an ADRV once it becomes final under applicable law. As shown by the IOC Decision, the IOC has adjudicated the Athlete's ADRV, which occurred at the Games. The Respondents have neither alleged that the IOC Decision was not final, nor have they submitted any arguments why the IOC Disciplinary Commission's finding on the Athlete's ADRV should not be recognized. Therefore, the Sole Arbitrator is comfortably satisfied that the Athlete has committed an ADRV and that there are grounds to impose a sanction on her under Rule 46.2 of the 2016-2017 IAAF Rules.

63. Secondarily, and *ex abundanti cautela*, the IAAF relies on the Adverse Analytical Finding, in the Athlete's A- and B1-Samples collected at the Games as well as the fact that the Athlete waived her right to the analysis of the B2-Sample and that the B2-Sample was not analysed.

64. The Sole Arbitrator notes that Rule 32.2(a) of the 2008 IAAF Rules forbids the presence of a prohibited substance or its metabolites or markers in an athlete's body tissue or fluids. The IAAF has presented one Doping Control report issued by the WADA-accredited Laboratory dated 8 July 2016 and related to the A-Sample and two documents referring to a second Doping Control report issued by the WADA-accredited Laboratory dated 28 July 2016 and related to the B1-Sample. According to the said reports, the Laboratory detected the presence of DHCMT metabolites in the Athlete's A and B1Samples. Considering that the Athlete has not disputed the Laboratory's finding, the Sole Arbitrator is comfortably satisfied that the Athlete has violated Rule 32.2(a) of the 2008 IAAF Rules and thus committed an ADRV. This finding is consistent with the IOC Disciplinary Commission's finding.

B. The World Championships 2011: Did the Athlete commit an anti-doping rule violation?

65. Pursuant to Rule 32.2(a) of the IAAF 2010-2011 Rules, the "*[p]resence of a Prohibited Substance or its Metabolites or Markers in the Athlete's Sample*" is an ADRV.

66. With regard to the Athlete's ADRV, the Sole arbitrator notes that it is undisputed that the Athlete's A- and B1-Sample revealed the presence of DHCMT metabolites, which is a Prohibited Substance under section S1.1.a of the 2011 Prohibited List.

67. Accordingly, the Sole Arbitrator holds that the Athlete has committed an ADRV.

C. Sanction

1. Period of Ineligibility Start and End Date

68. The Sole Arbitrator observes that the IAAF does not consider that the two ADRV should be considered multiple.

69. The consequence is that, pursuant to Rule 47.d(i) of the 2010-2011 IAAF Rules, the sanction imposed shall be on the violation that carries the most severe sanction. The IAAF correctly submits that in this respect the ADRV arising from the WC 2011 carries the more severe sanction as, contrary to the IAAF 2008 Rules, they provide for a possible increase of the standard sanction in case of aggravating circumstances.

70. Pursuant to Rule 40.2 of the 2010-2011 IAAF Rules:

"The period of Ineligibility imposed for a violation under Rules 32.2(a) [...], *unless the conditions for eliminating or reducing the period of Ineligibility as provided for in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows:*

First violation: Two (2) years 'Ineligibility'

71. Rule 40.6 of the 2010-2011 IAAF Rules provides as follows:

"Aggravating Circumstances which may Increase the Period of Ineligibility
[...] If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.
(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as a part of a doping plan or

scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

[...]"

72. In addition, Rule 40.7(d)(i) expressly sets out that *"the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Rule 40.6)"*.

73. The IAAF maintains that the evidence shows that the Athlete used a Prohibited Substance, namely DHCMT, at least twice, at the Games and the WC. This justifies as such the imposition of an aggravated period of ineligibility of up to four years.

74. Further, the IAAF asserts that the use of DHCMT was widespread in Russia at the relevant period, and by way of illustration, no fewer than 76 Russian athletes tested positive for DHCMT further to retesting of their samples from the Beijing and London Games (out of 96 positive retesting analysis). The Athlete's ADRV must be situated within the specific context of that pervasive and sophisticated doping program. In view of this, and especially given the fact that the Athlete committed two severe independent ADRV three years apart, the only suitable sanction is a four year Ineligibility period.

75. RUSAF or the Athlete did not put forward any specific position in respect of aggravating circumstances.

76. The Sole Arbitrator observes that it has been established that the Athlete committed two independent ADRV three years apart, and that the Athlete, therefore, used Prohibited Substances on more than one occasion.

77. Further, the Sole Arbitrator finds that the Athlete's ADRV are very serious as they both involve DHCMT, a non-specified anabolic steroid known to be sport enhancing, and the same substance taken previously by the Athlete.

78. The Sole Arbitrator is mindful that DHCMT was widespread in Russia at the relevant period. However, this is not sufficient evidence to conclude that the Athlete took part of a pervasive and sophisticated doping program.

79. Considering the seriousness of the Athlete's ARDV, and the fact that the aggravating factors in Rule 40.7(d)(i) of the 2010-2011 IAAF Rules are relevant in the present case,

the Sole Arbitrator finds that a period of ineligibility of four (4) years is appropriate to the severity and the Athlete's misbehavior.

80. With respect to the sanction start date, the Sole Arbitrator is guided by Rule 40.10 of the 2010-2011 IAAF Rules:

"Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility served."

81. The Sole Arbitrator finds that for practical reasons and in order to avoid any eventual misunderstanding the period of ineligibility shall start on 4 October 2016, the date of commencement of the provisional suspension, and not on the date of the award.

2. Disqualification

82. The Sole Arbitrator observes that since the violation that carries the most severe sanction is the ADRV arising from the WC 2011 (cf. supra paras. 57 and 69), the disqualification of results is submitted to Rule 39 of the 2010-2011 IAAF Rules which determines as follows:

"An anti-doping rule violation in connection with an In-Competition test automatically leads to disqualification from the Event in question, with all resulting consequences for the Athlete, including the forfeiture of all titles, awards, medals, points and prize and appearance money."

83. In the present case, the Sole Arbitrator observes that a re-test, which was performed in 2016, of a Sample taken 23 August 2008 and which showed the presence of a Prohibited Substance led to the provisional suspension by the IAAF only on 4 October 2016. The IAAF seeks disqualification of all the results of the Athlete for all the competitions in which she took part from 23 August 2008, date of the first positive sample, until her provisional suspension on 4 October 2016, together with the forfeiture of any prizes, medals, prize money and appearance money. This is a period of eight years and a little more than one month and is considerably longer than the maximum period of ineligibility of 4 years that can be imposed according to the IAAF Rules.

84. The Sole Arbitrator notes that pursuant to the literal wording of Rule 39of the 2010-2011 IAAF Rules all the competitive results of the Athlete as from the moment of the first positive sample was collected until her provisional suspension was pronounced would have to be disqualified.

85. Therefore, based on a literal reading of Rule 39of the 2010-2011 IAAF Rules, in principle all results of the Athlete as from 23 August 2008 until 4 October 2016 would

have to be disqualified, despite the fact that the IAAF has not provided any evidence of doping use by the Athlete except on 23 August 2008 (the date of doping test at the Olympic Games) and on 3 September 2011 (the date of the doping test at the World Championships).

86. The Sole Arbitrator aligns with *CAS 2016/0/4464* at para.182 and the observation made in this Award by the Sole Arbitrator, that "*the length of the period of ineligibility to be imposed must be defined considering the disqualification of the Athlete's results, which come equal to the effects of a retro-active suspension*".

87. The Sole Arbitrator holds that, even if the applicable rules provides for an automatic disqualification, the general principle of fairness must prevail in order to avoid disproportional sanctions. A fairness exception must thus be read in Rule 39 of the 2010-2011 IAAF Rules, since only when reading in this manner and applying fairly, this provision can be understood as complying with Article 10.8 of the World Anti-Doping Code and the proportionality requirement under general principles of law applicable in Switzerland and Monaco, being the seats of WADA and the IAAF respectively (see *CAS 2016/O/4464*, at para. 185).

88. According to established CAS jurisprudence, the principle of proportionality requires to assess whether a sanction is appropriate to the violation committed in the present case. Excessive sanctions are prohibited see *e.g. CAS 2005/A/830*, at paras. 10.21-10.31; *CAS 2005/C/976 & 986*, at paras. 139, 140, 143, 145-158; *CAS 2006/A/1025*, at paras. 75-103; *CAS 2010/A/2268* at paras. 141 *et seq.*; *CAS 2016/0/4463*, at para. 170 *et seq 2016/0/4464*, at para. 187 *et seq,* and *CAS 2016/0/4469*, at para. 182 *et seq*, all of them referring and analysing previous awards, cases from the European Court of Human Rights and doctrine.

89. The Sole Arbitrator in the present case aligns with the Panel in *CAS 2005/C/976 & 986* stating at para. 143:

"To find out, whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender."

90. The Sole Arbitrator also observes that the IAAF recognized that results should not be disqualified when fairness requires otherwise. Referring to the award issue in the case CAS 2013/A/3274, which set out that the severity of the violation should notably be taken into account to assess the scope of this exception, the IAAF however deems that there is here no reason not to disqualify any results obtained by the Athlete: the violation being particularly severe since she used in two occasions and in a sophisticated manner, an anabolic steroid, that has long term efffect.

91. The Sole Arbitrator has previously concluded that the Athlete used Prohibited Substances on more than one occasion and that the Athlete's doping therefore is severe

and repeated. The Sole Arbitrator considers that it is indeed not appropriate to maintain results on the basis of fairness where the doping is severe and repeated (cf. *e.g. CAS 2013/A/3274* at paras. 84-89).

92. However, the Sole Arbitrator aligns with *CAS 2016/A/4469* at para. 176, the need to *"Taking into regard that the sanction of disqualification of results embraces the forfeiture of any titles, awards, medals, points and prize and appearance money, the sanction of disqualification is to be held equal to a retroactive imposition of a period of ineligibility and, thus, is a severe sanction"*. The Sole Arbitrator does not consider it fair to disqualify any results of the Athlete between 24 August 2008 and 4 October 2016 considering that there is no evidence that the Athlete used doping substances or methods, except on 23 August 2008 and on 3 September 2011.

93. The Sole Arbitrator notes that it is the IAAF's policy in retesting cases to connect the disqualification period to the length of the ban (CAS 2016/O/4463, at para. 138). In the present case, the Sole Arbitrator notes that the severity of the violation put forward by the IAAF to request the disqualification of any results she obtained between 23 August 2008 and her provisional suspension, has already been taken into account when fixing the length of the imposed ban (cf. supra at para. 73 ff). In view of the circumstances of this case and, more particularly, of the existence of two ADRVs in three years and of the long-term effects of DHCMT, it is fair and proportionate to disqualify the Athlete's results for a period of four years following the first ADRV. The Sole Arbitrator observes that the Respondents have chosen not to submit any claims or arguments with respect to the disqualification of results.

94. Based on the above considerations, the Sole Arbitrator finds it justified to disqualify all of the Athlete's results obtained within four years from 23 August 2008, i.e. the date of the collection of the sample taken during the 2008 Games.

95. As a consequence, the Sole Arbitrator finds that all competitive results obtained by the Athlete from 23 August 2008 until 22 August 2012 are to be disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

IX. COSTS

96. Article R64.4 of the CAS Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the calculated in accordance with the CAS scale, the costs and fees and the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

97. Article R64.5 of the CAS Code reads as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

98. Rule 38.3 seventh sentence of the 2016-2017 IAAF Rules determines that the hearing of a case as the present before CAS shall proceed *"at the responsibility and expense of the Member [...]"*.

99. The IAAF requested that the arbitration costs are entirely born by the First Respondent pursuant to Rule 38.3 of the 2016-2017 IAAF Rules or, in the alternative, by the Respondents jointly and severally.

100. Taking into account the outcome of the arbitration and considering Rule 38.3 of the 2016-2017 IAAF Rules, the Sole Arbitrator sees no other possibility that rule that RUSAF shall bear the arbitration costs in an amount that will be determined and notified to the parties by the CAS Court Office.

101. Furthermore, pursuant to Article R64.5 of the CAS Code and in consideration of the complexity and outcome of the proceedings as well as the conduct and the financial resources of the parties, the Sole Arbitrator rules that the Athlete shall bear her own costs and pay a contribution towards the IAAF's legal fees and other expenses incurred in connection with these proceedings in the amount of CHF 2,000. RUSAF shall bear its own costs.

102. The present award may be appealed to CAS pursuant to Rule 42 of the 2016-2017 IAAF Rules.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Association of Athletics Federations (IAAF) on 22 September 2017 against the Russian Athletics Federation and Ms Elena Slesarenko is partially upheld.

2. A period of Ineligibility of four (4) years is imposed on Ms Elena Slesarenko starting from 4 October 2016.

3. All results achieved by Ms Elena Slesarenko from 23 August 2008 until 22 August 2012 are disqualified, including forfeiture of any titles, awards, medals, points and prize and appearance money obtained during this period.

4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne entirely by the Russian Athletics Federation.

5. Ms. Elena Slesarenko shall bear her own costs and is ordered to pay to the International Association of Athletics Federations the amount of CHF 2,000 (two thousand Swiss Francs) as a contribution towards the legal fees and other expenses incurred in connection with these arbitration proceedings.

6. The Russian Athletics Federation shall bear its own costs.

7. All other and further prayers or request for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 3 May 2018

THE COURT OF ARBITRATION FOR SPORT

Jens Evald
Sole Arbitrator